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ABSTRACT

Legislative intent as a debate tactic is drawn from the judicial system as a fundamental concept in the interpretation of statutes. Two paradigms for the application of legislative intent have emerged: (1) the courts will examine the affirmative proposal after enactment to bring it into line with the intent of the affirmative team, and (2) the debate judge is cast into the role of the adjudicator of the conflict concerning plan interpretation. The difficulties with the first paradigm include: courts may not become involved, courts may not accept intent as expressed by the affirmative in the debate, courts have generally chosen not to expand legislation beyond the language of the statute itself, and there is no record of the debate for courts to depend on. The major difficulty with the second paradigm is that a debate judge is not deciding upon the application of legislation but upon whether the proposal ought to be enacted at all. Educational reasons also argue against the use of legislative intent as a tactic: it introduces new arguments in the rebuttal stage, it may force the negative to abandon good arguments because the affirmative clarified too late in the debate, and it encourages the use of ambiguous language in formulating a proposal. (TJ)

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". . . And Affirmative Speeches Shall Not Serve as Legislative Intent!"

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Legislative intent is appearing with increasing frequency as an affirmative tactic. In many instances legislative intent provisions of affirmative plans do not play a significant role, relegated to the same position as the conventional restatement of affirmative fiat: ". . . to be implemented through all Constitutional and legislative means necessary." However, in other cases legislative intent has been utilized as a vehicle for plan expansion and amendment, thus becoming a fundamental issue in the debate.

Despite the frequent express reference to legislative intent, and its occasional emergence as an important issue in debates, there is little available literature exploring this concept as a forensic tool. The ubiquity of this provision suggests a need for discussion of its theoretical, practical, and educational implications for academic debate. This paper seeks to elucidate these issues, and, in doing so, provide reasons for the rejection of legislative debate as a tool for academic debate.

The phrase "legislative intent" is drawn from our system of jurisprudence. Authoritative sources, such as American Jurisprudence, have suggested that this concept is fundamental in the interpretation of statutes:

> In the interpretation of statutes, the legislative will is the all-important controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the pri-

> mary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature.[1]

Corpus Juris Secundum reaches much the same conclusion: "In the construction of a statute. . . the paramount rule is to give effect to the intention of the maker."[2] Supreme Court decisions such as Puerto Rico v. Shell Co.[3] and Vermilya-Brown Co. v. Connell, N.Y.[4] support these conclusions. It is evident that there is widespread, authoritative acceptance of legislative intent as a fundamental guide to statutory interpretation in our judicial system.

Two paradigms for the application of legislative intent have emerged in academic debate. The first suggests that the courts will examine the affirmative proposal after enactment to bring it into line with their intent. Operating within this senario, the affirmative intent provisions appear entirely superfluous, for the courts already consider themselves bound to consider a statute's legislative intent when interpreting that statute.

However, little attention seems to be paid in debate to the question of the probability and/or exact nature of court intervention. Three practical problems emerge: first, the courts may not become involved if the issue is not litigated; second, the courts may not accept intent as expressed by the affirmative in the debate; and, thirdly, the courts

have exhibited impressive restraint, not choosing to expand legislation beyond the language of the statute itself.

In order for the judge to dismiss plan objections based on the application of affirmative intent and court interpretation of their statute, the proposal must actually generate litigation over the point in question. This assumption cannot be made lightly. For example, one team debating the crime control resolution answered a state spending disadvantage by arguing that it was not their intention for the states to finance the prison expansion provisions of their plan. The affirmative in this instance cannot merely assume that prisoners, dissatisfied by crowded prison conditions, would sue the federal government and thus force it to take over the financing of prison expansion. First, there are "practical obstacles to prisoner writ writing, including the limited availability of legal research materials and restricted access to legal counsel." Even more important is the fact that until recently, Federal District Courts have refused to interfere with the internal affairs of state prisons under the "hands off" doctrine, thus making prisoner suit impossible.[6] This example illustrates the reason why affirmative teams cannot simply assume that litigation will always arise to provide the courts with the opportunity to utilize their intentions to alter the interpretation of their plan.

However, even if litigation does occur, other problems still exist. Although the courts are committed to reliance

on legislative intent in general, it is not certain that any given specific affirmative claim of legislative intent would be actualized by the courts. Two conditions mitigate against this possibility. Initially, there is no record of the debate for the courts to depend upon. Unfortunately, courts look to such formal, written documents for evidence of intent. Richard Nunez reports that "the most common form of extrinsic evidence used to establish legislative intent is legislative documents."[7] Other observers conclude that such records are virtually the only such source utilized by jurists: "With some historic (but virtually no other) exceptions, legislative history may be established only by the formal records of the proceedings and other official documents of the legislative body."[8] While transcripts are made of an extremely limited number of debates, these should not set a precedent for the vast majority of debates, which differ in this vital regard. The reason for this requirement of formal documents should be obvious--and especially appropriate given the context of academic debate. Courts are faced with questions concerning legislative intent when ambiguities come to light or when new applications, not anticipated by the legislature, arise. In these instances the court's search for the precise meaning of the wording of the statute in question requires a stable and consistent source of information to establish intent. Without hard evidence to analyze, the probability of judicial intervention in the manner suggested by the affirmative is low.

Additionally, there is simply no guarantee that the judge will actually operationalize the proposal in the fashion suggested by the affirmative even if there is litigation and the judge considers remarks made by the affirmative in the course of the debate. The courts are not bound by the statement of any individual legislator. Since judges differ in temperment and philosophy, court intervention may or may not result in adoption of the specific affirmative recommendations. There is simply no way to predict with certainty either the court's decision to rely on legislative intent or the exact nature of the court's eventual interpretation.

In many instances affirmative teams have used legislative intent to include "new" provisions not outlined in the plan, but which are alleged to be the only "fair" interpretation consistent with reason. However, the courts have posted an impressive record of restraint when dealing with such constructions. Such pleas have been rejected in the past. As Justice Cardozo has argued, "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it."[9] In 1975, one affirmative team, advocating the curtailment of U.S. covert military and political activities, neglected to prohibit such intervention. When the second negative speaker pointed out this rather serious flaw, the affirmative responded that it was obviously what they had "intended." Given the record of courts on such mat-

ters, the probability of judicial intervention is quite small. In such instances, the provisions of the plan are clear and the courts will not consider intent. Corpus Juris Secundum asserts that "In any event the debates or discussion [during passage] cannot be considered when the language of the statute is free from doubt."[10] Similarly, American Jurisprudence reports that: "ordinarily, courts may not extend a statute to meet cases not within its scope or purview, however meritorious they may be."[11] They sum up: "The legislative history of a statute may not compel a construction at variance with its plain words."[12] Thus, the use of legislative intent to justify plan amendments during the course of the debate is totally without support in our judicial system. The courts will use legislative intent to modify the interpretation of a statute; they will not use it to nullify clear provisions or to add provisions not actually implicit in the language of the statute itself, notwithstanding its legislative history.

Finally, although taken from the judicial system, the concept is not utilized in the same manner. It should be remembered that the debate is intended to decide upon the adoption of the affirmative proposal. Certainly Congressmen, in debating legislation, would never ask their peers to vote for faulty legislation on the assumption that some court would later reinterpret it so as to implement their intent. Any legislator suggesting such a course of action would not even be taken seriously.

A second paradigm offered for the application of legislative intent in debate casts the debate judge into the role of the adjudicator of the conflict concerning plan interpretation. In these instances, the debate judge is expected to re-interpret the plan consistent with intent expressed by the affirmative in the debate. As noted earlier, in the judicial system, this function occurs only after the enactment of legislation and during subsequent litigation. Nunez explains that "the necessity of hunting for legislative intent arises under two circumstances: first, when an administrator or court cannot read the statute and grasp its meaning because of shoddy draftmanship or language errors, and second, when the statute is understandable, but the case at hand was not anticipated at the time the statute was enacted."[13] Thus, a judge searches for legislative intent only after a statute has been enacted in order to determine how to apply it (either because it is unclear or because the present case was not anticipated). The debate judge, however, is not deciding upon the application of the legislation to an actual case; rather, the debate judge decides whether the proposal ought to be enacted.

This confusion may stem from the hybrid nature of debate. It occurs in a judicial setting, with two opposing teams of advocates debating before a judge, and thus it may appear that the debate judge could assume the function of a trial judge. However, debate functions as a legislature, debating over the desireability of proposed legislation.[14] While the setting of

debate may lead one to believe that the debate judge could assume the responsibility of deciding questions of legislative intent, the function of debate renders this second paradigm inappropriate. To call upon a debate judge to assume a judicial function summons visions of a legislature pouring over its own records, trying to determine what it meant by a proposal so it could decide whether to vote a bill up or down.

Furthermore, this added responsibility threatens the judge's impartiality. The judge is asked to shape the affirmative plan into its most advantageous form before deciding on its desireability. Negative teams probably are, and ought to be, leary of this possibility.

In addition, legislative intent is usually used in the academic debate with a clarity obtained from hindsight (i.e., the plan objections have already been presented). In Congress, when it becomes clear that a bill has been mis-written, the authors do not appeal to legislative intent; rather, the bill is taken back to committee, rewritten, and resubmitted at a later date. Thus legislative intent is an inappropriate vehicle for altering the interpretations of a plan during the debate.

Finally, regardless of the paradigmatic implementation, there are educational reasons to reject legislative intent in academic debate. First, it is at odds with certain useful conventions accepted by the debate community. Among these are agreements concerning the rejection of new arguments in rebuttals and requirements of argumentative consistency. Since

claims of legislative intent usually appear in first affirmative rebuttal (if not the last rebuttal), the negative team is unfairly penanized. At least half, if not all, of the negative constructive speaking time has passed before the affirmative clarifies its plan through assertions of legislative intent. The negative ought not be be forced to abandon some of all of its arguments because of a poorly or unclearly written affirmative plan, which is then "clarified" late in the debate. Furthermore, this practice serves to minimize substantive clash and analysis, an undesireable state of affairs.

One of the skills which participation in this activity can improve is language usage. One of the reason leading jurists offer for limiting legislative intent in the judicial system is the enhanced risk of legislative abuse of language. If the legislative bodies rely heavily upon the courts for correcting their statutes, the probability of poorly written statutes will be increased. As Justice Frankfurter observed, "what courts do with legislation may deeply affect what Congress will do in the future. . . Loose judicial reading makes for loose legislative writing."[15] In order to avert misfeasant legislative drafting of statutes, Frankfurter advocated a strict standard for interpretation: "The pressure on legislatures to discharge their responsibility with care, understanding, and imagination should not be stiffened or relaxed. Above all, they must not be encouraged in irresponsible or undiciplined use of language."[16] The standards of language usage in academic debate ought not be relaxed, either. Judges should encourage precision in the drafting of affirmative proposals.

Use of legislative intent may also allow deceitful practices by affirmative teams to proliferate. This fear has also been expressed in the judicial system. Folsom explains that "in some quarters it has been alleged that legislative intent is 'manufactured' by deliberately drafting a statute in broad or ambiguous terms and then inserting. . . a statement giving the provision an interpretation which, if it had been plainly expressed in the statute might not have been accepted."[17] It is certainly conceivable that some affirmative teams might try to capitalize on the acceptance of legislative intent in debate and write their plan ambiguously. Then, instead of refuting negative objections, the affirmative could simply argue that their opponents had misinterpreted their intent, allowing the affirmative to dismiss negative plan attacks. Conversely, a plan could be written in such detail as to appear contradictory, with contradictions resolved in rebuttals so as to best vitiate the negative attack through the use of legislative intent.

Admittedly, these practices exist now to some degree. However, their use would almost certainly increase dramatically if legislative intent finds widespread acceptance and application. Such practices should be viewed as reprehensible sunce they minimize clash on substantive issues, the antithesis of what good debate probably should be.

Legislative intent is a device used in the judicial system where statutes are unclear or new situations arise not

anticipated in the law. Both paradigms offerred to adapt this concept to academic debate have been examined and been found seriously wanting. Finally, educational reasons have been adduced for rejecting this tool.

FOOTNOTES

[1]American Jurisprudence, "Statutes," Rochester, N.Y.: Lawyer's Cooperative, 1974, 2nd edition, v. 73, §145.

[2]Corpus Juris Secundum, "Statutes," Brooklyn: American Law Book Company, 1953, v. 82, §321.

[3]302 U.S. 253. [4]335 U.S. 377.

[5]Robert J. Adams, "Corrections: Federal District Courts Will Intervene in the Operation of State Penal Systems to Protect Prisoner's Constitutional Rights," Illinois Bar Journal 65(December, 1976), p. 232.

[6]Ibid, pp. 230-32.

[7]Richard Nunez, "The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination," California Western Law Review, 9(1972), p. 131.

[8]Gwendolyn Folsom, Legislative History (Charlottesville: University of Virginia Press, 1972, p. 32.

[9]Justice Cardozo, Anderson v. Wilson, 289 U.S. 20, 27.

[10]Corpus Juris Secundum, §356.

[11]American Jurisprudence, §151. [12]Ibid.

[13]Nunez, p. 128.

[14]Of course, the judge's ultimate responsibility is to determine which team did the better job of debating. However, at least ostensibly the judge passes on the desireability of the affirmative proposal.

[15]Felix Frankfurter, "Some Reflections of the Reading of Statutes," Columbia Law Review 47(1947). p. 527.

[16]Ibid, pp. 545-6. [17]Folsom, p. 6.